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No. _____

IN THE

Supreme Court of the United States

October Term, 1983

JOHN R. BALELO, et al.,

Petitioners,

v.

MALCOLM BALDRIGE, Secretary of Commerce of the United States, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, consistently with the Fourth Amendment, an administrative agency may, without a warrant, without probable cause or reasonable suspicion, and without express statutory authority, station government surveillance agents aboard fishing vessels for three months to gather incriminating evidence to be used in criminal and civil prosecutions against vessel and crew.

2. Whether the enforcement provision of the Marine Mammal Protection Act, authorizing a warrantless search of a vessel only if there is reasonable cause to believe a violation exists, prohibits the stationing of government surveillance agents aboard fishing vessels without such reasonable cause.

LIST OF PARTIES

1. Petitioners are the plaintiffs below, John R. Balelo, Andrew Castagnola, Leo Correia, Manuel D. Jorge, Bryan D. Madruga, Harold Medina, John A. Silva, Ralph F. Silva, Jr., George Sousa, Manuel S. Vargas, Jr., John B. Zolezzi, Jr.

2. Respondents are the defendants below, Malcolm Baldrige, Secretary of Commerce of the United States, Richard A. Frank, Administrator, National Oceanographic and Atmospheric Administration (NOAA) and Terry Leitzell, Assistant Administrator for Fisheries, National Marine Fisheries Service (NMFS). Additional Respondents are Intervenor-Defendants below, Environmental Defense Fund, Inc. and Defenders of Wildlife.

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The petitioners, John R. Balelo, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion *en banc* of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 24, 1984.

OPINIONS BELOW

The opinions of the Court of Appeals *en banc* are reported at 724 F.2d 753, and appear in Appendix A hereto.

(The majority opinion commences at p. 1a; Judge Pregerson's concurring opinion at p. 21a; Judge Nelson's concurring opinion at p. 22a; Judge Tang's dissenting opinion at p. 23a; and Judge Ferguson's dissenting opinion at p. 31a.)

The opinions of the original three-judge panel of the Court of Appeals, not reported, appear in Appendix B hereto.

(The majority opinion commences at p. 36a; Judge Goodwin's dissenting opinion at p. 45a.)

The opinion of the District Court for the Southern District of California is reported at 519 F.Supp. 573, and appears in Appendix C hereto (commencing at p. 48a).

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit *en banc* was filed on January 24, 1984, and appears in Appendix D hereto. (Pet. App. 59a.) This Court's jurisdiction is invoked uner 28 U.S.C. § 1254(1).

PROVISIONS OF CONSTITUTION, STATUTE AND REGULATION INVOLVED

1. United States Constitution, Fourth Amendment (set forth in Appendix E, p. 60a).

2. United States Code, Title 16 § 1377 and § 1381 (set forth in Appendix E, pp. 60a, 62a).

3. Code of Federal Regulations, Title 50 § 216.24(f) (set forth in Appendix E, p. 64a).

The pertinent portion is as follows:

> "(f) *Observers* (1) The vessel certificate holder of any vessel certified shall, upon the proper notification by the National Marine Fisheries Service, allow an observer duly authorized by the Secretary to accompany the vessel on any and all regular fishing trips for the purpose of conducting research and observing operations, including collecting information which may be used in civil or criminal penalty proceedings, forfeiture actions, or permit or certificate sanctions."

STATEMENT OF THE CASE[1]

Background

Petitioners, eleven tunaboat captains, brought an action for declaratory and injunctive relief in the district court seeking to invalidate a regulation promulgated by the Secretary of Commerce under the Marine Mammal Protection Act (MMPA), 16 U.S.C. § 1361, *et seq.* Jurisdiction of the district court was predicated upon 28 U.S.C. § 1331 and §§ 2201-2.

Under the regulation, tuna purse-seine fishing vessels were required, as a condition of a permit to fish, to carry onboard government surveillance agents for the 90-day duration of a voyage, to observe operations and gather evidence to be used against vessel and crew in criminal prosecutions and civil penalty and forfeiture proceedings. The district court granted an injunction prohibiting any but scientific use of the data gathered by the agents. A three-judge panel of the Ninth Circuit affirmed and remanded to the district court to expand the injunction to preclude the placement of agents on the vessels for any purpose without a warrant. A divided *en banc* court (not including any of the original panel members) reversed.

The regulation deals with a method of fishing for tuna utilizing porpoise as a means of locating the fish. For reasons not yet fully understood, yellowfin tuna tend to swim in association with schools of porpoise in areas of the eastern tropical Pacific Ocean. (J.E.R. 497.) Capitalizing on this affinity, tunaboats often encircle a school of porpoise with a large net (seine), which is then drawn closed at the bottom (pursed), capturing the tuna. Most porpoise are freed through a special maneuver, but in the process porpoise are sometimes injured or killed. (J.E.R. 497.)

The fishermen have developed special gear, techniques and maneuvers to minimize such unintended injury to porpoise, and over the past

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[1] Except for footnote material, the factual assertions in the following statement of the case are based upon an Agreed Statement of Facts filed by the parties in the district court which is included in the Joint Excerpt of Record (J.E.R.) filed in the court below.

decade porpoise mortality has declined from an estimated 300,000 per year to under 8,900 in 1983.[2] (J.E.R. 497.)

The Statute

In 1972 Congress enacted the Marine Mammal Protection Act, 16 U.S.C. § 1361, *et seq*. The Act imposed a moratorium on the taking and importation of marine mammals. 16 U.S.C. § 1371(a). A two-year exemption from the moratorium was granted for the taking of marine mammals incidental to commercial fishing operations. 16 U.S.C. § 1371(a)(2). During the two-year exemption, a research and development program was to be conducted to further improve fishing gear and techniques. 16 U.S.C. § 1381(a).

After the two-year exemption, incidental taking of porpoise was allowed under permits to be issued by the Secretary of Commerce subject to regulations which the Secretary was empowered to adopt. 16 U.S.C. § 1371(a)(2) and § 1373.

As enacted, the MMPA included a limited non-enforcement observer program. 16 U.S.C. § 1381(d) provided for the placement of federal observers aboard tuna vessels on a space-available basis for the purpose of conducting research and observing operations in regard to the development of improved fishing methods and gear. This statutory authorization and the research program expired by their own terms on October 21, 1974. 16 U.S.C. § 1381(a), (d). The government does not claim this expired section of the Act as expressly authorizing the current observer regulation. (J.E.R. 499.)

Section 1377 of the Act is entitled "Enforcement" and authorizes the Secretary to utilize federal and state officers to enforce the MMPA. Subsection (d) is captioned "Execution of Process; Arrest; Search; Seizure" and provides in pertinent part:

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[2] NMFS Porpoise Mortality Status Report No. 83-20, dated January 30, 1984. The annual mortality quota for the U.S. fleet is 20,500 for each of the years 1981-1985. 50 C.F.R. § 216.24 (table). According to government estimates published in 1980, the porpoise population of the eastern tropical Pacific was 7.4 million as of 1979, increasing at an annual rate of 4% compounded, or in excess of 300,000 porpoise a year. 45 F.R. 72179, 72184-5.

> "(d) . . . such person so authorized may, in addition to any other authority conferred by law -
>
> . . .
>
> (2) with a warrant or other process, or *without a warrant if he has reasonable cause to believe that a vessel* or other conveyance subject to the jurisdiction of the United States *or any person on board is in violation of any provision of this subchapter or the regulations* issued thereunder, *search such vessel* or conveyance and arrest such person;" [Emphasis added.]

Individual violations of the Act or regulations are punishable by a civil penalty of not to exceed $10,000 for each violation. Willful violations may result in criminal penalties of one year imprisonment and a $20,000 fine. Vessels may also have their cargo seized and forfeited, and the vessel is subject to a civil penalty of $25,000. 16 U.S.C. §§ 1375, 1376. The Secretary may pay informers up to $2,500 for information leading to conviction. 16 U.S.C. § 1376(c).

The Regulation

Pursuant to Section 1373, the Secretary in 1974 promulgated extensive regulations governing the taking of marine mammals. (J.E.R. 498.) In 1974 and in every year thereafter the Secretary has issued a general permit to the American Tunaboat Association. (J.E.R. 498.)[1] Individual purse-seine vessels wishing to fish "on porpoise" obtain a "certificate of inclusion" under the general permit. All plaintiffs are holders of a certificate of inclusion. (J.E.R. 498.)

The regulations issued by the Secretary, 50 C.F.R. § 216.24, cover nearly all facets of fishing for tuna on porpoise, from required

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[1] The American Tunaboat Association is an association of tunaboat owners which is headquartered in San Diego, California, and is the only holder of a Category 2 General Permit, which authorizes tuna purse-seine fishing involving the intentional encircling of marine mammals. 50 C.F.R. § 216.24(b)(1)(ii). The permit issued to the ATA is for the area commonly referred to as the eastern tropical Pacific Ocean, extending from 40 degrees North latitude to 40 degrees South latitude and from 160 degrees West longitude to the coast of North, Central and South America.

maneuvers and net construction down to the minutiae of the number of face masks and scuba tanks to be available for porpoise rescue operations.[4]

The regulation in issue is 50 C.F.R. § 216.24(f), effective January 1, 1981, which provides in pertinent part:

> "(f) *Observers* (1) The vessel certificate holder of any vessel certified shall, upon the proper notification by the National Marine Fisheries Service, allow an observer duly authorized by the Secretary to accompany the vessel on any and all regular fishing trips for the purpose of conducting research and observing operations, *including collecting information which may be used in civil or criminal penalty proceedings, forfeiture actions, or permit or certificate sanctions.*" [The italicized portion of the regulation is language which did not appear in any previous version of the regulation. (J.E.R. 501.)]

Pursuant to this regulation, the Secretary assigned federal surveillance agents, denominated "biological technicians", to approximately one-third of all trips made annually by purse-seiners holding certificates of inclusion. (J.E.R. 499-501.) Prior to the district court injunction in this case, the data gathered by observers was reviewed by the enforcement branch of NOAA, which then issued notices of violation to captains and owners of vessels deemed to have violated the porpoise regulations, and assessed penalties against them. (J.E.R. 500.)

The agents live aboard the vessel for the duration of a fishing voyage, often lasting 90 days. (J.E.R. 500.) They take their meals with the fishermen and bunk in crew's quarters (at government expense). (J.E.R. 499.) They are not confined to any particular areas of the vessel, although fishing operations are to be observed from on deck. (J.E.R. 500.) They have access to the pilothouse to obtain position data and the radio room for transmission of messages.

The NMFS issues a Field Manual and associated logs and record forms for use by the agents. (J.E.R. 502.) The Manual directs agents, *inter*

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[4] Fishermen are required by the regulations to manually aid with the release of porpoise trapped in the net from a rubber life raft. 50 C.F.R. § 216.24(d)(2)(vii). There have been cases of death and severe injury from sharks during this rescue operation.

alia, to perform the following functions: (a) record observations pertaining to the United States Marine Mammal Regulations; (b) maintain open communication with the vessel operator and other vessel personnel; (c) obtain several crew estimates of the size and species composition of porpoise schools before a set is commenced and after capture; (d) obtain the captain's estimate of the size and species composition of porpoise schools after the net is let go and after capture; (e) obtain the captain's comments regarding each set and his justification for failure to observe a required procedure, as well as any disagreement with the recorded observations of the observer; (f) make and record a physical count of dead or injured porpoise during capture and after the net is brought aboard the vessel; (g) require the crew to retrieve dead mammals and retain them aboard in cold storage as specimens. (J.E.R. 502.)

Observed trips are scheduled well in advance. NMFS advises a vessel of a prospective agent placement by certified letter. The vessel is required to give at least five days notice prior to departure in order to facilitate agent placement. 50 C.F.R. § 216.24(f)(4).[5]

No warrants are sought by NMFS for the placement of the agents. (J.E.R. 501.) When the agent boards the vessel and departs port, neither he nor the NMFS has reasonable cause to believe the vessel or any person on board is in violation of the MMPA or regulations as described in Section 1377. (J.E.R. 499-501.)

The Decisions Below

The district court determined that the surveillance regulation promulgated by the Secretary was not authorized under the MMPA and was in direct conflict with the search and seizure standard set forth in Section 1377 of the Act, in that it was a warrantless search without reasonable cause; further, that the placement of agents on fishing vessels without warrant was a search in violation of the Fourth Amendment, and did not come within the pervasively regulated industry exception to the warrant requirement. The court enjoined the use of observer-gathered data for other than scientific purposes. (Pet. App. pp. 48a-58a.)

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[5] In addition, a predeparture conference is held between the agent and a representative of the agency and the captain and owner of the vessel.

The original three-judge panel of the Ninth Circuit, one judge dissenting, affirmed the judgment, but remanded the case to the district court to expand the injunction to prohibit placement of agents aboard tuna vessels for any purpose without warrant. The panel held that express statutory authority was required to authorize the warrantless surveillance program. (Pet. App. pp. 36a-44a.)

En banc, a divided Ninth Circuit (not including any member of the original panel) reversed, holding that the regulation was within the "implied authority" of the Secretary and, assuming *arguendo* that the placement of agents constituted a search, it fell within the pervasively regulated industry exception to the Fourth Amendment warrant requirement. The *en banc* majority specifically held that express statutory authority for warrantless searches was not required under the exception. (Pet. App. pp. 1a-21a.) Judges Pregerson and Nelson wrote concurring opinions. Judge Tang wrote a dissenting opinion joined in by Judge Ferguson, and in part by Judge Canby. Judge Ferguson wrote a separate dissenting opinion.

REASONS FOR GRANTING THE WRIT

A. Introduction

This case has generated seven separate opinions by the fourteen appellate judges who have considered it. The case presents significant issues under the Fourth Amendment involving the authority of an administrative agency to design its own warrantless law enforcement scheme allowing extended searches without any reasonable cause, for the purpose of detecting criminal conduct that has not yet occurred and may never occur.

In reversing the district court, the *en banc* majority upheld an unprecedented administrative plan of compelled live-in government surveillance. If this decision stands, government agents will, for the first time, be empowered to live among and monitor the activities of individuals day-by-day, week-by-week, for up to three uninterrupted months, and to report back to those responsible for initiating criminal prosecutions and civil penalty proceedings any incriminating evidence that they may discover.

This extraordinary "policeman-in-residence" program is not authorized by any warrant, or probable cause, or even express congressional grant. It derives instead from a 1981 agency regulation.

As we discuss below, there can be no doubt that the installation of government surveillance agents aboard fishing vessels is overwhelmingly intrusive and constitutes a search within the meaning of the Fourth Amendment. Congress was certainly aware that a fishing vessel at sea is not merely the fisherman's place of business, but is as well his home-away-from-home. In enacting the MMPA, Congress was careful to provide a far stricter search and seizure standard, permitting warrantless searches only if there is reasonable cause to believe a violation exists, which is not the case here.

The *en banc* majority brushed aside this congressionally mandated standard for warrantless searches, holding that in view of his broad rule-making authority, the Secretary had the power to confer on himself what amounts to an unlimited authority to search without restriction. No prior court, to our knowledge, has ever declared that an executive enforcement officer may independently define and determine his own warrantless search authority, a doctrine fundamentally at odds with the Fourth Amendment.

This Court has adhered to the principle that, under the Fourth Amendment, an administrative search must be authorized by a warrant absent exigent circumstances or consent. The rare exceptions to this principle have occurred in situations where Congress itself has determined that warrantless inspection is essential to enforcement of a regulatory act, and has expressly authorized it. In this case the *en banc* majority, by endorsing a warrantless and standardless administrative search scheme that not even Congress has expressly authorized, has placed itself in conflict with these decisions.

The majority's opinion leaves regulatory agencies free to determine, unchecked by the independent judgment of an impartial magistrate or of the Congress, when, where, whom and how long they may search without a warrant, an unbridled discretion no law enforcement agency has ever been granted under the Fourth Amendment. The only limits on the Secretary's arrogated search authority here are those set by himself.

Moreover, by eliminating even the rudimentary requirement that there be necessity for a particular warrantless search, the *en banc* majority has

reduced the Fourth Amendment's protections to a matter of administrative convenience, and issued an invitation to those charged with the enforcement of the myriad federal and state regulatory statutes to opt for on-site police surveillance based solely upon expediency and cost-effectiveness.

It is no answer to say, as does the *en banc* majority, that the on-board surveillance is simply a condition of doing business and that fishermen are free to avoid such warrantless scrutiny by not applying for a permit to fish. If this rationale were applied to all industries within the regulatory power of Congress, with participation in them conditioned upon a waiver of privacy rights, the combination of regulation and waiver would devour the Fourth Amendment. A citizen cannot be forced to the Hobson's Choice between his constitutional rights and his job.

Unless this Court grants review, the decision of the *en banc* majority will constitute a final resolution of the significant constitutional and statutory issues presented by this case. The United States tuna purse-seine fleet, which is the subject of the challenged regulation, is based almost exclusively in Southern California, as is the holder of the general permit. The fishing area within the purview of the regulation is the eastern tropical Pacific Ocean. The impact of the regulation, though considerable, is, for all practical purposes, geographically circumscribed by the jurisdiction of the Ninth Circuit. Thus the decision of the *en banc* majority of the Ninth Circuit will be final for the affected fishermen and the entire tuna industry unless this Court grants certiorari.

B. The Regulation is Invalid Under the Statute

The installation of government surveillance agents aboard tuna purse-seine vessels is unquestionably a search within the Fourth Amendment. Under *Camara v. Municipal Court*, 387 U.S. 523 (1967) and *See v. City of Seattle*, 387 U.S. 541 (1967), as reaffirmed in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), the entry of government agents upon residential or commercial premises to conduct inspections or investigations, no matter how benign or "administrative," is a search triggering traditional Fourth Amendment protections. At the core of the Fourth Amendment is the right to be free from arbitrary governmental instrusion, *Camara*, 387 U.S., at 528, or as Justice Brandeis termed it, the "right to be let alone." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (dissent).

Moreover, the premises involved here are not simply commercial premises. Unlike a stone quarry, *Donovan v. Dewey*, 452 U.S. 594 (1981), or a gun shop, *United States v. Biswell*, 406 U.S. 311 (1972), a fishing vessel at sea is not merely a place of employment, it is the fisherman's floating home, the very "framework of his existence." *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 732 (1943).

Rather than installing an electronic video and listening device on these premises, the agency here installs a government agent. Both law enforcement activities clearly constitute a search. That the agency has given advance notice makes this no less a search than if an agency announced before hand that it was going to video-tape all activities occurring on one's premises.

Thus, the decisions of this Court leave no doubt that the boarding of a tuna purse-seiner by a government agent armed with log books, suitcase and toothbrush for a 90-day encampment, coupled with a mandate to detect evidence of criminal conduct by the captain and crew with whom he bunks and takes his meals, is a search within the Fourth Amendment.[6]

As both the defendants and the *en banc* majority conceded, no provision of the MMPA expressly authorizes the warrantless search of fishing vessels prescribed by the regulation in question. "It is quite true that the MMPA does not expressly confer upon the Secretary a power to impose, as a condition of obtaining a permit, the stationing of an observer on a vessel." (*En banc* majority opinion, Pet. App. 9a). Indeed the only express authority for any type of observer placement is contained in Section 1381 of the Act, which authorized on-board government observers on a space-available basis for observations related to research and development of improved fishing gear and techniques for a two-year period. It is undisputed that this section had no law enforcement implications and that it expired by its own terms on October 21, 1974.

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[6] The *en banc* majority could not reach accord on this crucial threshold issue. Judge Pregerson, concurring, thought no search was involved. (Pet. App. 21a.) Judge Nelson, concurring, believed it "over-whelmingly intrusive," a "massive invasion of privacy" and a search pure and simple. (Pet. App. 22a.) Judges Tang, Ferguson and Canby, dissenting, concluded there was a search. (Pet. App. pp. 28a, 31a.) The majority opinion equivocated, but assumed *arguendo* that a search was involved. (Pet. App. 16a.) This ambivalence and the division of the court suggest continuing difficulties in applying the "expectation of privacy" test of *Katz v. United States*, 389 U.S. 347 (1967).

Even more significantly, however, Congress laid down a specific search and seizure standard in the Act, 16 U.S.C. § 1377. This it could do, as ". . . Congress has broad authority to fashion standards of reasonableness for searches and seizures." *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970). The standard selected by Congress authorizes searches under the MMPA without a warrant only if there is reasonable cause to believe the vessel or anyone on board is in violation of the act or regulations. 16 U.S.C. § 1377(d)(2).

However, under the administrative scheme at issue here, government agents are permitted to board vessels and make these ships their living quarters for months on end although they have no warrant, no reasonable cause to believe a violation exists, and indeed no cause whatever even to suspect that a violation will occur. Despite the explicit standard provided in the Act for warrantless searches, the *en banc* majority held that the broad rule-making authority conferred on the Secretary *impliedly* empowered him to adopt a different standard by regulation. (Pet. App. 9a, 15a.) This decision makes a shambles of the statutory language and scheme.[7]

First, the search and seizure provision in Section 1377 is both a grant of authority and a limitation. Power to search without a warrant is granted only if there is reasonable cause. It makes absolutely no sense to suppose that Congress placed a statutory restriction on the administrator's power to search and yet at the same time granted the adminstrator the power to abrogate that standard as he sees fit.

Second, the *en banc* majority's construction hands over to the administrator the power to determine for himself when, where and whether

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[7] The *en banc* majority's sole justification for this extraordinary construction is that the paragraph containing the search and seizure standard is preceded by an introductory phrase "in addition to any other authority conferred by law." The majority states in conclusory fashion that "The regulation prescribing the observer program comes within the meaning of 'other authority conferred by law' as used in section 1377." (Pet. App. 15a.) This *ipse dixit* gives no clue regarding how the prefatory phrase may be read to give the Secretary power to abrogate the specific search and seizure standard laid down in Section 1377. Judge Tang's dissent scores this omission, pointing out that such a reading would render the section meaningless and self-emasculating. (Pet. App. 26a.) Had Congress intended the Secretary to have the power to modify the statutory standard, it would have done so in clear terms and not obliquely. And had Congress intended that the restricted observer placement authorized by Section 1381 be continued and expanded into a law enforcement device, it would not have provided for its expiration in 1974.

he may conduct searches without a warrant, an unbridled discretion prohibited by the Fourth Amendment. This Court's holding in *United States v. United States District Court*, 407 U.S. 297, 316 (1972) is so directly on point that it is appropriate to quote it at length:

> "The Fourth Amendment does not contemplate the executive officers of government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate and to prosecute [Citation omitted]. *But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks.* The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech." [Emphasis added.]

In *Colonnade* this Court invalidated a forcible entry of a liquor storeroom not expressly authorized by statute, stating: "Under the existing statutes, Congress selected a standard that does not include forcible entries without a warrant." 397 U.S. 70, at 77 (1970). So too here, Congress selected a standard that does not include warrantless searches without reasonable cause, and the administrator cannot override that statutory standard by regulation.

C. The Regulation Violates the Fourth Amendment

Warrantless searches are generally unreasonable.

> ". . . [E]xcept in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it be authorized by a valid search warrant." *Camara v. Municipal Court*, 387 U.S. 523, at 528-9 (1967); See, also, *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978).

As discussed above, the stationing of government surveillance agents aboard tuna purse-seine vessels is a search within the Fourth Amendment. Since this insinuation of government agents is without warrant, reasonable cause or express statutory authority, the general Fourth

Amendment rule renders the regulation unconstitutional unless some exception applies.

The *en banc* majority thought that the regulation fell within the "pervasively regulated industry" exception to the warrant requirement. (Pet. App. pp. 17a-20a.) In reaching this conclusion the majority seriously misread this Court's decisions recognizing an extremely narrow exception, decisions that the Court described in *Barlow's* as "responses to relatively unique circumstances." 436 U.S., at 313.[8]

The elements common to *Colonnade, Biswell* and *Dewey* are: (a) a closely regulated industry; (b) a congressional determination, to which this Court deferred, that unannounced, frequent warrantless inspections were necessary because enforcement would be frustrated by a warrant requirement; (c) an express congressional authorization of warrantless inspection; and (d) statutory limitations upon the time, place and scope of such inspections, tantamount to the protections of a warrant.

As explained in *Dewey*, legislatively prescribed warrantless inspection schemes meeting these criteria may be reasonable under the Fourth Amendment, and this greater latitude for warrantless inspections of commercial property is based upon a lesser expectation of privacy in such premises than in homes. 452 U.S., at 598-9. By definition the exception is therefore inapplicable to residences, which in itself places this case outside the exception. As discussed above, a fishing vessel at sea is not simply a place of employment. It is also the fishermen's home. Indeed, Congress recognized as much by requiring reasonable cause for warrantless searches of vessels under the MMPA.

Moreover, unlike this case, in each of the decisions upholding warrantless inspections, *Colonnade, Biswell* and *Dewey*, Congress had expressly authorized such inspections. The *en banc* majority viewed this express congressional consideration and approval as irrelevant, a factor that was

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[8] *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), upheld warrantless entry of premises dispensing alcoholic beverages as authorized by the Internal Revenue Code, but struck down forcible entry of a storeroom not expressly authorized by the statute. *United States v. Biswell*, 406 U.S. 311 (1972), upheld warrantless entry of establishments dealing in firearms authorized by the Gun Control Act of 1968. *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), struck down warrantless entry of commercial premises dealing in interstate commerce under OSHA. *Donovan v. Dewey*, 452 U.S. 594 (1981), upheld warrantless inspections of stone quarries mandated by the Federal Mine Safety & Health Act.

not an integral part of the Court's holdings (Pet. App. 18a.) But, as we next discuss, express statutory authority for warrantless inspection is a *sine qua non* of the exception.

In *Biswell* the Court held that "inspection may proceed without a warrant *where expressly authorized by statute*." 406 U.S., at 317. In *Dewey*, the Court's rationale for upholding quarry inspections under the Federal Mine Safety & Health Act was that Congress had specifically determined that warrantless inspection was necessary for enforcement of the Act, had mandated warrantless inspection in the Act, and had provided sufficient limits upon the discretion of the executive and protections of privacy interests in the Act itself. 452 U.S., at 603-605. In both of the cases the Court acknowledged its deference to the congressional determination, embodied in the act, that warrantless inspection was essential to enforcement. *Biswell*, 406 U.S., at 315-316; *Dewey*, 452 U.S., at 602-603. And in *Colonnade*, the Court held in no uncertain terms that even "Where Congress has authorized inspection but made no rules governing the procedures that inspectors must follow, the Fourth Amendment and its various restrictive rules apply." 347 U.S., at 77.

Express statutory authority is required under the narrow pervasively regulated industry exception for quite a fundamental reason. The Fourth Amendment warrant requirement provides an essential check upon the presumptively unbridled zeal of the executive to search. The independent, impartial judgment of the magistrate stands between the citizen and the agents of the government, assuring that there is probable cause to justify any intrusion of privacy, and that the intrusion will be appropriately limited in location, time and objective.

As *Colonnade*, *Biswell* and *Dewey* demonstrate, the intermediary role of the magistrate may sometimes be filled by the Congress (subject, of course, to the scrutiny of the Court) in setting standards for warrantless searches in carefully limited circumstances. As a separate branch of the government and a representative body responsible to the citizens, Congress may with some degree of impartiality and detachment give advance authorization for certain types of warrantless inspection by the executive or enforcement branch which it deems essential to carrying out its regulatory acts. This Court has acknowledged in *Colonnade*, *Biswell* and *Dewey* that it has deferred to this congressional judgment where appropriate, and has not hesitated to intervene where it is not. *Barlow's*, 436 U.S. 307.

But it is impermissible under the Fourth Amendment for the executive or administrative agency to decide for itself how its discretion to search is to be limited. Indeed, allowing the administrator charged with enforcement to determine the scope of his own power to search, under a theory of "implied authority," is to endorse unbridled executive discretion. This is why under the Fourth Amendment express statutory authority for warrantless searches is a fundamental prerequisite.

Under the *en banc* majority's rationale, however, it is not Congress which decides the scope and limits of search authority, but the Secretary, the searcher himself. In failing to recognize the requirement of express statutory authority for warrantless searches, and sustaining the administrator's power to determine his own search authority, the *en banc* majority placed itself in conflict with the decisions of this Court and the Fourth Amendment.[9]

Moreover, the *en banc* majority misperceived another critical element of *Biswell - Dewey*, by failing to address the prerequisite of the necessity for warrantless search. *Biswell* and *Dewey* validated the warrantless inspections there involved, and distinguished *See*, upon the ground that Congress had determined that warrantless inspection was essential to enforcement and the requirement of a warrant would frustrate inspection. *Biswell*, 406 U.S., at 315-316; *Dewey*, 452 U.S., at 600, 602-603. Similarly, *Barlow's* struck down warrantless inspection under OSHA in part because warrantless inspection was not demonstrably essential. 436 U.S., at 316-317, 324.

Regardless of the need for a search, the question remains whether there is a need for the search to occur without a warrant. It is a question the majority did not answer, as the dissenters pointed out. (Pet. App.

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[9] A parallel principle also mandates express congressional authority for regulations touching upon sensitive constitutional rights. This principle is succinctly expressed in *Greene v. McElroy*, 360 U.S. 474, 507 (1959), denying the implied authority of the Department of Defense to adopt procedures for revoking security clearances not according a right of confrontation:

> ". . . explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. *Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them.*" (Emphasis added.)

29a-30a, 34a.) The *en banc* majority failed to determine, or require a showing of, the necessity for the warrantless search involved here, apparently under the misapprehension that necessity for employment of the particular enforcement technique (on-board surveillance) sufficed. (Pet. App. pp. 11a, 17a-20a.) In so doing the majority fell into the erroneous mode of analysis pointed out in *Camara*, 387 U.S., at 533 (1967): "The question is not, at this stage at least, whether these inspections may be made, but whether they may be made without a warrant."

In any event, the majority below could not have made the requisite determination that the warrantless search in question is necessary to enforcement of the MMPA, since the record demonstrates the contrary. The factors alluded to in *Biswell* and *Dewey* as manifesting the necessity for warrantless inspection are the imperatives of surprise and frequency of inspection. *Biswell*, 406 U.S., at 316, *Dewey*, 452 U.S., at 603. Those factors are conspicuously absent in the instant case.

Ironically, the *en banc* majority hoists itself on its own petard when it acknowledges that "Thus, the surprise element of many warrantless inspections is lacking here." (Pet. App. 20a.) As the majority itself points out, the regulation requires that tuna vessel owners be given advance notice by certified letter of the stationing of an observer on their vessel. The NMFS Field Manual establishes a predeparture conference between the owner, captain, observer and an agency official. The regulation requires the vessel to give the agency five days notice prior to departure. As the dissents note (Pet. App. 30a, 34a), this advance scheduling and absence of surprise contravene the underlying rationale for warrantless inspection. Further, since federal observers are assigned to approximately one-third of the purse-seine fishing trips each year, no undue administrative burden would be imposed upon the system if warrants are required.

In dispensing with the requirement that warrantless search be necessary to enforcement, the *en banc* majority decision not only conflicts with the decisions of this Court under the pervasively regulated industry exception, it effectively reduces exceptions to the warrant requirement to a matter of administrative convenience and cost-effectiveness, which are not the criteria by which Fourth Amendment rights have been measured. The warrant is not "an inconvenience to be somehow 'weighed' against the claims of police efficiency." *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971).

Finally, the *Colonnade - Biswell - Dewey* cases all involved administrative "spot" inspections of the type where an investigator enters upon commercial premises to conduct a brief physical inspection and then departs. With such intrusions "the possibilities of abuse and the threat to privacy are not of impressive dimensions . . ." *Biswell*, 406 U.S., at 317. The *en banc* majority's extension of the pervasively regulated industry exception to the "massive" continuous invasion of privacy represented by the "policeman-in-residence" scheme here, however, is an unwarranted qualitative and quantitative leap from the brief "spot" inspections approved by this Court. At the very least, if such an unprecedented program of continuous, in-residence law enforcement is constitutionally permissible, the decision to utilize it should be clearly made and declared by Congress, not by a mere administrator, neither elected by nor responsive to the citizens.

D. The Regulation Imposes an Unconstitutional Condition

The government cannot make a business dependent upon a permit and then make an otherwise unconstitutional requirement a condition to the permit. *Frost v. Railroad Commission*, 271 U.S. 583 (1926); *United States v. Chicago Milwaukee, Etc. R.R.*, 282 U.S. 311 (1931); *Spevack v. Klein*, 385 U.S. 511 (1967). "If so, constitutional guarantees, so carefully safeguarded against direct assault, are open to destruction by the indirect, but no less effective process of requiring a surrender, which, though in form voluntary, in fact lacks none of the elements of compulsion." *Frost v. Railroad Commission*, 271 U.S. 583, at 593.

The *en banc* majority appears to suggest that the regulation may be upheld because it conditions a permit on submission to warrantless search, and a tunaboat captain is free not to submit to such inspection by declining to seek a permit. (Pet. App. pp. 18a, 19a.) That position is not supported by the citation to *Biswell*, 406 U.S., at 315-16, on which it relies.

Although *Barlow's* discussed *Colonnade* and *Biswell* in terms of "implied consent," 436 U.S., at 313, the Court was careful in *Dewey* not to predicate its rationale upon that basis, a factor noted in the dissent, 452 U.S. at 610-612.

Not only is there no true consent involved in the acquiescence in a condition to a permit, but application of this rationale to all of the industries

within the ambit of Congress' regulatory power would lead to the inevitable extinguishment of the requirement of a warrant to search commercial property, a result contrary to the general rule of *See v. City of Seattle*, 387 U.S. 541 (1967).

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit *en banc*.

Respectfully submitted,

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